Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of Section 9 of the Communications Act	)	
	)	MM Docket No. 94-19
Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year	)	

To the Commission:

JOINT COMMENTS OF BLADE COMMUNICATIONS, INC., CABLEVISION INDUSTRIES CORP., CROWN MEDIA, INC., MULTIVISION CABLE TV CORP., PARCABLE, INC., PROVIDENCE JOURNAL COMPANY, SAMMONS COMMUNICATIONS, INC., STAR CABLE ASSOCIATES

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Summary

The Joint Parties urge the Commission to modify its proposals to implement the regulatory fee provisions of Section 9 of the Communications Act in the following respects. Pass through of new federal regulatory fees is appropriate based on the Commission's treatment of other governmental fees for rate regulation purposes and necessary to avoid further economic harm to the cable industry. In light of the legislation's guiding principle of assessing the intended beneficiaries of the Commission's regulatory programs, it is imperative to reexamine and rectify the patent imbalance in fees imposed on cable, telephone and broadcasters. In particular, services which compete directly with cable, which benefit directly from the Communications Act and the Commission's regulations and which are not presently subject to these governmental levies must be assessed from the outset at the same rate as cable. Small systems under 1,000 subscribers should be exempt from these fees or, at a minimum, should be taxed on the same per subscriber basis as larger systems as required by the statute. Finally, the definition of a large fee for installment payment purposes should be reduced or cable operators should be permitted to compute their fees based on aggregate subscriber counts at the company or MSO level.

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Blade Communications, Inc., Cablevision Industries Corp., Crown Media, Inc., MultiVision Cable TV Corp., ParCable, Inc., Providence Journal Company,[1/] Sammons Communications, Inc. and Star Cable Associates, by their attorneys, hereby submit their Joint Comments in response to the above-captioned Notice of Proposed Rulemaking to implement the collection of regulatory fees. Each of the Joint Parties owns, operates and manages cable television systems and, accordingly, will be directly affected by the outcome of this proceeding.

1/ Providence Journal Company conducts its cable television operations through its subsidiaries Colony Communications, Inc. and King Videocable Company.

Introduction

The Joint Parties are aware that the framework of the Commission's recovery of regulatory fees is largely governed by statutory provisions. Nonetheless, there are a number of areas in which the Commission has been delegated and should exercise flexibility and discretion in implementing the fee program. Specifically, these areas include (1) acknowledgement that these newly-imposed governmental fees constitute external costs which are eligible for pass through to subscribers under the Commission's cable television rate regulation rules and policies; (2) establishment of a more equitable distribution of fee assessments among various regulated services and the inclusion of certain services which are not contemplated by the NPRM; and (3) clarification or modification of certain issues with regard to the assessment and collection of fees for cable television operators. The Joint Parties urge the Commission to consider and accept the following comments and recommendations in adopting its implementing regulations.

Cable Regulatory Fees Must Be Allowed to Be Passed Through As External Costs

The 1992 Cable Act unambiguously identifies governmental taxes and fees as a cost item which the Commission must take

into account in formulating its rate regulation rules; such fees include:

> the reasonably and properly allocable portion of any . . . fee, tax or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers.[2/]

The Commission has heeded this statutory command and has expressly specified that state and local franchise fees are an external cost which may be passed through to subscribers over and above the system's reasonable rates calculated in accordance with the benchmark rules; increases in such fees are likewise eligible for pass through.[3/]

As the Act's accompanying legislative history observes, itemization and pass through of such fees serves to ensure that consumers are aware that some portion of cable rates is attributable to governmentally imposed costs:

> The fact is sometimes rates have gone up because of hidden, unidentified increases in fees or taxes which the cable [company] has to pay and . . . passes on to the consumers . . ..[4/]

[2/] Section 623(b)(2)(c)(v) of the Act; 47 U.S.C. § 543(b)(2)(C)(v).

[3/] 47 C.F.R. § 76.922(d)(2)(1993).

[4/] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631, 5967, ¶ 545 (1993) ("Rate Order") citing 138 Cong. Rec. S569 (January 29, 1992) (remarks of Senator Lott in introducing eventual final version of Section 622(c)).

Precisely the same considerations of accountability apply to federal regulatory fees. Governmental fees of this nature, at both the federal and non-federal levels, are intended to offset the cost of regulatory programs; as such programs are intended ultimately to redound to the benefit of the public and inasmuch as the cable operator has no control over such costs,[5/] it is entirely appropriate for them to be passed through. Such treatment is particularly warranted in the case of these new fees as they were not reflected in September 1992 rates which formed the basis for the benchmark rules nor were they otherwise taken into account in any of the Commission's rate regulation proceedings.

Regulatory parity likewise compels allowance of federal regulatory fees as external costs. As discussed in a subsequent section, various of cable's direct competitors -- among them DBS, MMDS and commercial ITFS -- may not, at least immediately, be subjected to federal fees. While the Joint Parties urge the Commission to remedy this imbalance in the future, it appears that at least for some period of time these services will not bear such costs and will enjoy a significant competitive advantage in the ability to charge lower rates. Moreover, even if they should be included in the fee program, as the Joint Parties believe they clearly

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5/ See Rate Order, 8 FCC Rcd at 5790, ¶ 254 noting that franchise fees are largely beyond the control of the operator.

should be, as unregulated services there is no regulation impediment to their recovering such costs in full from their subscribers. No justification exists for disadvantaging cable by requiring it to absorb these fees from regulated revenues; pass through of federal fees clearly comports with the Act and the Commission's rules and policies and should be allowed.

Fairness and Equity Call For Reexamination of the Proposed Fee Allocations and for the Inclusion of Other Services

The NPRM proposes to adopt, for FY 1994, the fee amounts set forth in the statute but acknowledges that Congress has given the Commission authority to modify the fee schedule under certain circumstances; the Commission states that it does not intend to do so for FY 1994.[6/] The Joint Parties point out that the permissive adjustments which may be made by the Commission under Section 9(b)(3) do not, in contrast to the mandatory adjustments under Section 9(b)(2), contain an express limitation that such changes may only be made after FY 1994. Thus, it would be entirely appropriate for the Commission to adopt Section 9(b)(3) changes for FY 1994; at a minimum, conservation of Commission resources warrants consideration and adoption of such changes for future fiscal

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[6/] NPRM at 4-6, ¶ 5-7; 47 U.S.C. § 159(b)(3). The Commission's 1994 fiscal year runs from October 1, 1993 to September 30, 1994.

years in this proceeding so as to avoid the need for the immediate initiation of a subsequent rulemaking to deal with FY 1995 fees.

A guiding principle of the regulatory fee program is furtherance of one of the "National Performance Review goals of reinventing government by requiring beneficiaries of Commission services to pay for such services."[7/] Based on this standard, it is abundantly obvious that the principal beneficiaries of the Commission's substantive cable television regulatory program are cable's competitors and customers. The Cable Television Consumer Protection and Competition Act of 1992 and the FCC's implementing regulations afford television broadcasters must-carry, retransmission consent and channel positioning rights; other distribution technologies -- DBS, MMDS, video dialtone providers, etc. -- enjoy a statutory right of access to cable programming on governmentally supervised rates, terms and conditions. And cable subscribers are provided a host of protections and intended benefits ranging from pervasive governmental rate control for services and equipment to technical and customer service standards. As these recently adopted regulatory programs are implemented, much of the Commission's resources will be devoted to enforcement actions

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7/ NPRM at 3, ¶ 2.

to ensure that these benefits are in fact available to their intended recipients.

Viewed from the perspective of the end users of various telecommunications services, it is evident that there are gross disparities in the Commission's proposed allocations of regulatory fees. For example, the schedule of regulatory fees would assess a commercial VHF television station in one of the top ten television markets essentially the same amount as a cable system serving 50,000 subscribers ($18,000 for VHF station; $18,500 for cable system). Yet the viewing audience commanded by a station in one of the top ten markets ranges from 6,723,700 to 1,520,900 TV households,[8/] or from 134 to 30 times the audience of a 50,000 subscriber cable system which is assessed the same amount. Similarly, inter-exchange carriers, local exchange carriers and cellular service providers are each assessed $60 per 1,000 subscribers; cable, at $370 per 1,000 subscribers, is taxed at over six times as much. Disparities of this magnitude cannot be justified on any rational basis and can only be viewed as punitive. The Joint Parties strongly urge the Commission to rectify this inequitable imbalance.[9/]

[8/] Warren Publishing, Cable & Station Coverage Atlas, 1994 ed. at 311-12.

[9/] The Joint Parties do not propose a specific reallocation of assessments but simply urge the Commission to adopt a fee schedule which reflects a rational parity among regulated services.

The Joint Parties also urge the Commission to revisit the assessments for various services which directly compete with cable in the provision of video programming. The NPRM notes that DBS was not included in the statutory fee schedule but indicates that this service will be added in FY 1995.[10/] As previously discussed, the Joint Parties see no impediment to the Commission's ability to add new services or categories during FY 1994. As DBS is expected to be available this year, it would be entirely appropriate to levy a regulatory fee on DBS in FY 1994; failure to do so would simply provide an emerging competitor with an unwarranted "free ride" and competitive advantage. The NPRM also notes that ITFS was not specifically listed in the statutory schedule, presumably because of its noncommercial educational status. While this exclusion may be appropriate if limited to noncommercial purposes and uses, it is clearly not appropriate to the extent excess ITFS channel capacity is being leased to other parties or otherwise used to provide commercial services. Finally, MMDS is not expressly addressed in either the statute or the NPRM. This omission can only be an inadvertent oversight as MMDS operators enjoy the use of spectrum allocated and regulated by the Commission, benefit from the Commission's program access rules and provide a competitive video service to the public on a subscription

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[10/] NPRM at 26-27, ¶ 60, n. 52.

basis. Maintenance of a competitive level playing field mandates that each of these services -- DBS, MMDS and commercial ITFS -- be assessed on the same basis and in the same amount as cable service; absent a change in the amount levied on cable, each of these services should also be assessed at $0.37 per subscriber.

The Joint Parties also urge the Commission to take commercial cable channel leasing into account in fashioning its regulatory fee rules. Channel lessees are afforded a governmentally guaranteed right of access to channel capacity on cable systems over a certain size and are assured regulatory and judicial supervision of rates, terms and conditions of carriage.[11/] Congress presumably intended that such rights and remedies were needed to provide competition to cable and potential diversity of service for the viewing public. To the extent that a cable operator does not enjoy the benefits of the full commercial use of its channel capacity and is forced to make some portion of its capacity available to a direct competitor, the operator's regulatory fee should be reduced to that extent. At a minimum, the Commission should ensure that its final cable leased channel rules provide that in setting a reasonable leased channel rate, the operator may pass on to the lessee

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11/ Section 612 of the Act; 47 U.S.C. § 532.

an appropriate share of the regulatory fee in addition to the rate for channel capacity.

Certain Aspects of the Proposed Regulatory Fee Program for Cable Television Should Be Modified or Clarified

1. Systems with Less than 1,000 Subscribers Should Be Exempt or, At A Minimum, Should Be Assessed At $0.37 Per Subscriber

Notwithstanding numerous other instances under the 1992 Cable Act or where the Commission's rules have traditionally exempted systems with less than 1,000 subscribers from burdensome regulatory requirements, the NPRM proposes not only to include such systems but also to assess all small systems at the full amount for 1,000 subscribers regardless of the actual subscriber count.[12/] While the Joint Parties submit that small systems below 1,000 subscribers should not be subjected to any additional regulatory burdens, absolutely no justification exists for "rounding up" systems in this category to the full 1,000 subscriber fee. The Commission does not appear to have engaged in such rounding up for larger systems[13/] and similar treatment for systems below

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[12/] NPRM at 31, ¶ 55 and Appendix C, Table 2. Systems in the categories of 500-999, 250-499 and below 250 subscribers are all assessed at the full amount of $370.00.

[13/] Appendix C, Table 2 indicates that for systems above 50,000 subscribers, the average size is 97,459 subscribers and the average fee is $36,060; if the Commission

(continued...)

1,000 is called for. Moreover, calculation of fees based on the system's actual subscriber count is consistent with clear legislative intent that fees be imposed on a "per subscriber per year" basis; in particular, Congress was concerned that "small systems do not pay a disproportionate share of the amount collected by the Commission."[14/] In light of this clear Congressional directive, small systems, if they are not to be exempt, must be subject to the same per subscriber per year fee as the statute requires for all systems.

2. The Amount Of A Large Cable Fee For Installment Payments Should Be Reduced Or Cable Operators Should Be Allowed To Aggregate Payments

The NPRM notes that although Section 9(f) directs the Commission to establish procedures for the payment of large fees in installments, it does not provide guidance as to what constitutes a large fee; the Commission proposes to define a large fee as one which greatly exceeds the average annual fee

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[13/](...continued)
were rounding to even multiples of 1,000 subscribers, the fee would be either $35,890 or $36,260.

[14/] H.R. Rep. No. 207, 102d Cong., 1st Sess. 24 (1991). H.R. Rep. No. 213, 103 Cong., 1st Sess. 499 (1993) states that the 1993 statute is virtually identical to the legislation which passed the House in 1991 and incorporates by reference the applicable provisions of the earlier House Report. A subscriber on a 250 subscriber system assessed at the full $370.00 amount would be passed through $1.48 or four times the statutory amount -- clearly a "disproportionate share."

for regulatees in a particular category.[15/] For cable, the NPRM defines a large fee as the amount paid by a 50,000 subscriber system ($18,500.00); the 221 systems of this size or larger, as Appendix C points out, represent less than two percent of all cable systems. Based on a universe of 11,083 systems with a total estimated fee payment of $21,207,955.00,[16/] the average fee per system is $1,914.00. The Joint Parties submit that defining a large cable fee as $5,000.00, or more than two and a half times the average, would constitute an amount which "greatly exceeds the average annual fee for regulatees in a particular category."[17/] Accordingly, they propose that cable fees above $5,000.00 should be eligible for installment payments.

Alternatively, if the Commission is determined to establish an extremely high threshold for installment payments, cable operators should be able to calculate all of their fee payments at the parent company or MSO level, rather than at the system, for purposes of the large fee test. While the Commission has proposed that eligibility for

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15/ NPRM at 16, ¶ 29.

16/ The estimated fee payment of $21,207,955.00 is overstated to the extent it improperly assesses all systems below 1,000 subscribers at $370.00. A more accurate estimate is achieved by multiplying 53,375,474 subscribers by $0.37, or $19,748,925.00; this produces an average fee per system of $1,782.00.

17/ NPRM at 16, ¶ 29.

installment payments should be determined at the operating or service area level, no rational justification has been advanced, and indeed none exists, for this approach. An MSO with a small number of large, highly clustered cable systems, with presumably attendant efficiencies and economies of scale, would be able to defer up to half of its fee obligations under the Commission's proposal; an equally sized MSO with a large number of smaller systems would not have the comparable benefit of the use of the deferred monetary payment.

Accordingly, the Joint Parties urge the Commission to lower the amount to be defined as a large fee for cable operators to $5,000.00 or permit aggregation of fee payments, or both. Such treatment is necessary to avoid an obvious imbalance in fee assessments which result from circumstances entirely beyond the cable operator's control.[18/]

[18/] The Commission should also clarify, consistent with its treatment of cable subscriber counts in other contexts, that bulk billed subscribers should be computed on an equivalent billing unit basis for purposes of determining the operator's per subscriber fee liability.

CONCLUSION

On top of the drastic reduction in the cable industry's revenues and cash flows imposed by comprehensive rate regulation, the federal government now requires the industry to contribute an estimated $21,000,000 in per subscriber fees plus a significant additional amount of CARS, TVRO and business radio license fees. Allowance of a pass through for these new governmentally imposed external costs over which the cable operator has no control and which were not taken into account in the Commission's formulation of maximum rates is necessary to comply with the letter and intent of the 1992 Cable Act and to avoid further impairment of cable's ability to fund new technologies and to participate in the development of the nation's telecommunications infrastructure. Additionally, the Commission must ensure that the fee structure equitably assesses all regulated services and, in particular, that it include from the outset, which it presently does not, all services which are directly competitive with cable -- e.g. DBS, MMDS and commercial ITFS. Finally, if the Commission does not exempt small systems altogether, it must assess them at the same rate on a per subscriber basis; it should also lower the amount considered

to be a large cable fee or permit cable operators to calculate subscriber fees on a company or MSO-wide basis.

Respectfully submitted,

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